No. 6537

United States
Circuit Court of Appeals
For the Ninth Circuit

C. A. RASMUSSON, as Collector of Internal Revenue for the District of Montana,

Appellant,

vs.

EDDY'S STEAM BAKERY, INC., a Corporation,

Appellee.

Supplemental Brief of Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

T. B. WEIR,
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(Helena, Montana.)

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STATEMENT

Upon conclusion of arguments in this case before this Court the parties were by the Court given time to submit briefs on the question whether or not this Court could consider the question of *sufficiency of the findings to support the judgment* in view of the fact that no special findings appeared in the record, under Sections 773 and 875 Title 28, U. S. C. A., dealing with trial by court without jury, and special findings as condition of review of fact questions.

Appellant now asks diminution of the record, first, to correct the error in placing in the printed record defendant's motion for judgment at close of plaintiff's case, when the motion was actually made at close of all the evidence. This is a mere clerical error, and appellee, of course, consents that the record should be so corrected.

By its motion for diminution of record appellant also seeks to add to the record in this Court the order of the District Court made and filed in the District Court, January 26, 1932, that

> "the decision entered herein on the 5th day of February, 1931, be and the same is hereby adopted by the Court as its Special Findings of Fact and Conclusions of Law, that it be so entitled and considered, and that this order be entered nunc pro tunc as of date February 5, 1931."

ARGUMENT

These supplemental proceedings can avail appellant nothing.

First, appellant has not assigned error upon either the ruling of the trial Court on his motion for judgment at the close of the evidence, nor upon the sufficiency of the findings to support the judgment.

Second, there is no such "plain error not assigned" as the Court will notice without assignment under Rule 24.

Third, trial court made general finding on the trial (T. 73) and after the appeal the cause was so far moved out of the trial court as to divest it of authority to make the order of January 26, 1932, (Appellant's Supp. Brief, p. 16) adopting its decision as the special findings of fact referred to in Section 875, Title 28 U. S. C. A. The fact statements in the decision were neither adopted, nor designated, nor intended by the trial court as the special findings referred to in the Section 875, at any time prior to the appeal or within the term, and however much the trial court may have intended the fact statements in the decision as reason for its conclusions of law, nevertheless no request was made by the litigants for special findings under Section 875 as grounds for review in this Court, and the recitation of facts in decision were not intended by the trial court as compliance with that section, and the

trial judge does not now so state. To adopt the decision as findings under the Section would call for a *new and additional adjudication* on the part of the trial court, *not a correction of the record to disclose an adjudication had within the term or prior to loss of jurisdiction by the appeal.*

Fourth, in view of the record there is no room to urge upon the Court, that "with every inference of fact that might be drawn from it (the evidence) in favor of the plaintiff" the evidence was insufficient in matter of law to sustain a judgment for plaintiff, which is the measure specified by the Supreme Court in Maryland Casualty Co. vs. Jones, 279 U. S. 792, 73 L. ed. 960, cited in appellant's supplemental brief page 4. And this Court's jurisdiction to review the evidence is confined to the consideration of error in the trial Court's ruling on this motion.

Fifth, if the decision could be considered as findings, and if error had been specified, the review here would be only of the question *whether the facts found are sufficient to support the judgment and not whether the evidence supports the findings,* and the fact statements of the decision support the judgment on the question of who owned the income from the bakery business and $3,000.00 of plaintiff's claim to judgment.

NO ASSIGNMENT OF ERROR AND NO PLAIN ERROR THAT COURT MAY CONSIDER WITHOUT ASSIGNMENT.

Appellant made no attempt to assign error as to the sufficiency of findings. Neither Appellant's assignment I nor can any other of the assignments of error be construed as referring to the trial Court's ruling on defendant's motion for judgment. Assignment No. I is directed to the judgment ordered by the Court.

Exclude the Court's decision and we take it that there can be no claim that the record presents any "plain error" prejudicial to defendant, such as the Court might consider under subdivision 4 of Rule 24.

If we could consider the decision as findings, certainly that would add to the record nothing from which the Court sould say a "plain" error was presented,—an error so obvious that the Court would consider it as a matter of course and without assignment.

Certainly the error cannot be "plain" if to consider it at all would be necessary to remand the cause for special findings.

HISTORY OF APPELLATE PROCEDURE IN LAW CASES TRIED TO COURT WITH JURY WAIVED.

Taft, J., in Humphreys v. Bank, 75 Fed. 852-855.

decided in 1896, furnishes a schedule of questions of fact and questions of law that may be reviewed in cases tried under these statutes (Secs. 773 and 875, Title 28 U. S. C. A.) and the method of raising those questions on appeal.

These statutes were introduced in 1865, to cure defects in procedure theretofore under the common law, and the former procedure as well as the changes resulting from the legislation is discussed at length in

> Flanders v. Tweed, 9 Wall. 425, 19 L. ed. 678;
> Martinton v. Fairbanks, 112 U. S. 67, 28 L. ed. 862.

And the leading cases dealing with errors that may be corrected by the trial court after it has lost jurisdiction of the cause proper are reviewed in each,

> In Re Bills of Exceptions, 37 Fed. (2d) 849, (6th Circuit);
> Aetna Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395, see especially dissenting opinion for review of cases.

AFTER THE TERM AND AFTER APPEAL PERFECTED THE TRIAL COURT HAS NO JURISDICTION TO MAKE AN ORDER ADOPTING HIS DECISION AS FINDINGS OF FACT.

The question presented is of much more importance

than the instant case. It involves procedure in all future cases tried to the Court in this district. If this Court shall approve the procedure here undertaken, then in future the decisions of the trial judge becomes a part of the record on appeal subject to review, and all that need be to accomplish this result is either, that the trial judge label the decision "Special Findings," or that, within the term, or after the term and appeal perfected, as here, the trial judge make an order to the effect that the decision was intended as special findings and through clerical error it was not so labeled. This would be an innovation in our procedure.

Beginning with the enactment of this statute on special findings in 1865 we have an unbroken line (unless the Boon case is contra) of decisions by the Supreme Court refusing to accept the trial court decision or opinion as a compliance with the statute.

> Dickson v. Bank, 83 U. S. 258, 21 L. ed. 278; Fleischmann v. Forsberg, 270 U. S. 350, 70 L. ed. 624-629.

The reason running through all these cases, is not the technical one of how the thing is "labeled," but is that *a compliance with the statute requires a finding of every ultimate fact necessary to sustain the judgment, and that upon examination of the opinion it is apparent the trial judge did not have in mind a compliance with the statute, because the decision makes no find-*

ing whatever upon contested facts so obviously necessary to the support of the judgment, and that notwithstanding the trial judge has recited or referred to some of the more closely contested facts in giving reasons for his conclusions of law, there are other contested fact questions in the case so obviously necessary to the judgment that it is not within reason the trial judge could have overlooked them or deliberately failed to find on them, if he had intended the decision as special findings under the statute.

Take the instant case. It is for money had and received; by its complaint, plaintiff claims $3,819.63 (paragraph IV T. 3); the answer puts this amount in issue (paragraph III T. 22); on the trial the parties admitted the figure $3819.63 was correct, and judgment is given for $3,819.63 with interest from November 19, 1926, according to the prayer of the complaint, and yet in the trial court's decision (T. 65), though the action is for money had and received, there is no finding of the amount due. The mere casual way in which the decision refers to this figure "some $3,000 income taxes" (T. 66) indicates that in preparing the decision the judge had not in mind "special findings" under the statute but *reasons* for his conclusions.

This proceeding is not only contrary to long established procedure, but would actually deprive the litigants of their plain rights.

For instance, in this case, no special findings were requested; by the well established rule the court's decision is no part of the record; there is no right or duty of the litigant to make a record of exceptions to any matter in the decision. And yet, if after the appeal and time for bill of exceptions has expired.

Re Bills of Exceptions, 37 Fed. (2d) 849,

the trial judge may make this order upon any ground whatsoever adopting the opinion as "special findings," *the litigant is deprived of his right to object and except to those findings* (for deficiencies or otherwise) *and deprived of his right to preserve his objections and exceptions for review. The only way such objections and exceptions may be preserved for review is by bill of exceptions, and the time has long since passed (by lapse of the term and by the appeal) when the Court had any authority to settle a bill of exceptions.*

Exporters v. Butterworth, 258 U. S. 365, 66 L. ed. 663. And the rule that the trial court may correct clerical errors to make the record speak the truth does not imply that jurisdiction over the cause is by that rule preserved or restored to the trial judge to adjudicate or settle a bill of exceptions, even with regard to the act of making the changes.

Were the rule otherwise, the litigant would never know when he had the whole record up on appeal. If the record could be added to in this manner, by the same reasoning it can be changed and added to over

and over again until the expiration of the time for rehearing in the appellate court.

The trial court's opinion is not an order or adjudication. The making of findings specified in the statute, Section 875 Title 28 U. S. C. A., contemplates a judicial act of the court, an order which becomes part of the record, made especially for use upon appeal. Confessedly no such order was made in this case. The court did recite certain facts in the opinion, in the mind of the court, justifying his general finding, conclusions of law and judgment order, but this was no compliance with the statute.

> "The opinion of the trial judge, dealing generally with the issues of law and fact and giving the reasons for his conclusions, is not a special finding of facts within the meaning of the statute."
>
> Fleischmann v. Forsberg, 270 U. S. 350, 70 L. ed. 634-629, Opinion below 298 Fed. 320.

> "It is an extended opinion (reported 162 Fed. 556) in which the trial judge refers to the issues formed by the pleadings, portions of the evidence, the statute, and the contentions advanced by counsel, and then discursively disposes of those contentions, and concludes that the penalty sought to be recovered had not been incurred by the defendant. Repeated decisions of the Supreme Court, as also this court, make it altogether plain that such an opinion is not a special findings within the meaning of the statute."
>
> U. S. v. Sioux City S. Y. Co. 167 Fed. 126-127, Opinion by Van Devanter, J., Opinion below 162 Fed. 556.

"The opinion was copied into the judgment entered, but is not, and was evidently not intended to be, a special finding of the ultimate facts, in the nature of a special verdict, such as is contemplated by Sections 649 and 700 of the Revised Statutes."

York v. Washburn, 129 Fed. 564-566, Opinion by Van Devanter, J., and opinion below in 118 Fed. 316.

Cyc. of Federal Procedure, Vol. 6, page 640, treating this subject, states:

"Special findings, within the purview of the statute, must be such as the statute contemplates; not a mere report of the evidence, but a finding of all those ultimate facts upon which the law must determine the rights of the parties. In this the special findings are to be likened to a special verdict of a jury. The opinion of the judge dealing generally with the issues of law and fact and giving reasons for his conclusion, is not such a special finding and is not reviewable as such." Citing:

Wilson v. Merchants L. & T. Co., 183 U. S. 121, 46 L. ed. 113;

St. Louis v. Western Union Telg. Co., 166 U. S. 388, 41 L. ed. 1044;

Grayson vs. Lynch, 164 U. S. 468, 41 L. ed. 230;

Lehnen v. Dickson, 148 U. S. 71, 37 L. ed. 373.

It will be noted that the decisions in these cases, as well as in the long line of cases cited in these opinions, do not turn on the fact that the trial court opinion is not entitled "Special Findings," but in each instance

the holding is that the substance of the decision does not amount to a special finding as required by the statute.

Having failed to request special findings, appellant by the order of January 26, 1932, attempts to have the court adopt its decision as special findings. It is reasonable to assume the court was not contemplating the requirements of the statute on findings when preparing the opinion, and to establish the practice of resorting to the opinion in lieu of findings cannot promote the ends of justice.

Moreover, this is not an attempt to correct clerical error, but to adjudicate a matter in this cause, to-wit, make special findings where none were made prior to the appeal.

> "In this case, there is a statement by the judge who decided the case, containing his opinion both on facts and the law, and which is attached to the record, and has been sent up with it. But this opinion appears to have been filed, not only after the suit had been ended by a final judgment, but after a writ of error had been served removing the case to this court. This statement of the judge cannot, therefore, be regarded as part of the record of the proceedings in the Circuit Court, which the writ of error brings up, and cannot, therefore, be resorted to as a statement of the case."
>
> U. S. v. King, 7 How. 833, 12 L. ed. 934, 940.

Appellant cites Aetna Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395, as authority for this procedure. In

that case the question was only as to the jurisdiction of the trial court to make findings after the term. The case does not deal with the question of jurisdiction of the trial court after judgment and appeal perfected, or overrule or refer to the King case, 7 How. 833, 12 L. ed. 934.

The Boon case seems to turn on this proposition:

> "But there must be a finding of facts, either general or special, in order to authorize a judgment; and that finding must appear on the record. In this case, there was no formal findings of fact when the judgment was ordered. It is to be inferred, it is true, from the judgment and from the entry of the clerk, that the issues made by the pleadings was found for the plaintiffs, but how, whether generally or specially, does not appear. There was, therefore, a defect in the record, which it was quite competent for the court to supply by amendment; and such amendment was made." (24 L. ed. 396 right column).
>
> * * * * * * * * * * * * *
>
> "In so holding we do not depart from anything we have ever decided respecting the power of a court to make up a case, after the expiration of a term, for bills of exceptions not claimed at the trial. This is not a case of that kind. It is a case of a correction of the record; not merely an allowance of exceptions never taken, and necessary to have been taken, to bring an interlocutory ruling upon it." (24 L. ed. 397 right column).

The Boon decision is by divided court, Justices Strong, Bradley, Hunt, Swayne and Davis supporting

the decision, and Clifford, Miller and Field dissenting upon the question of whether the special findings were properly before the court.

The majority opinion in the Boon case seems never to have been followed or cited to this point by that court in the fifty-four years it has been on the books. The dissenting opinion is confined to this point and goes into the question at great length, and we must assume the case has been in effect overruled by those later decisions of the court, without exception refusing to consider the trial court's decision as special findings under the statute, in whatever form the opinion may have been presented in the record. In York v. Washburn, 129 Fed. 564-566, Van Devanter, J., refused to accept the trial court's decision as special findings when set out at length in the judgment. Even Mr. Justice Strong's earlier opinion in Dickinson v. Bank, 83 U. S. 250, 21 L. ed. 278, runs counter to the Boon case.

RECORD HERE DISCLOSES, BY CLERK'S RECITALS IN JUDGMENT, THAT GENERAL FINDING WAS MADE.

As we view it, the weakness of the majority opinion in the Boon case lays in the fact that it is based on the propositions, (a) that "there was * * * * a defect in the record," because it did not affirmatively appear

whether the judgment was based on general or special findings. No authority is cited by Justice Strong for such a proposition, and, of course, none can be, for if there is anything settled in the law, it is that the entry of judgment imports general findings and nothing more need appear. For example, in the instant case the judgment entered by the clerk recites

> "and the court thereafter * * * having made and filed herein its opinion and findings in favor of plaintiff and against defendant, and directing judgment as prayed in the complaint," (T. 73)

nothing more is required in the way of findings to complete the record.

> (See reasoning presented dissenting opinion Boon case 24 L. ed. p. 402, right column).

Therefore, we suggest the decision in the Boon case rests upon this wrong premise; also (b) the court there assumes the proposition, "There was, therefore, a defect in the record, which it was quite competent for the court to supply by amendment." This would seem to be a false premise, first, because the record was complete with the judgment purporting general findings, and, second, because the fact of a defect in the record does not of itself authorize action by the trial court after it has lost jurisdiction. The rule goes no farther than to authorize that a record be corrected to speak that which actually occurred upon the trial,—*not what the trial judge intended to do, but*

what he actually did. And there would seem to be no more reason for allowing the order for special findings after the term in the Boon case based upon the trial court's opinion, than there would be for allowing a bill of exceptions after term based on a reporter's transcript, or the court's notes, or memory.

Moreover, the court in the Boon case does not seem to have considered the impossibility of preserving the objections and exceptions of the litigants to findings placed in the record in such manner, in view of the inflexible rule of that court that no bill of exceptions may be settled by the trial judge after the term.

RECORD NOT PREPARED IN CONTEMPLATION OF PROPOSED INNOVATION.

The proposed innovation would be a trap for litigants and eminently unfair from still another angle.

Law cases tried to the court without jury by stipulation, may be reviewed (a) in respect to rulings by the trial court on admission or rejection of evidence or conduct of trial, (b) in respect to ruling on motion for judgment, (c) in respect to special findings made, or failure to make, (d) in respect to sufficiency of special findings to support the judgment.

Humphreys v. Bank, 75 Fed. 852-855, opinion by Taft, J.

For review under either (a), (b) and (c) bill of exceptions is necessary.

If the court has made no special findings, the litigants are justified in settling bill of exceptions exclusively to review (a) court's ruling on evidence, or (b) exclusively to review court's ruling on motion for judgment, in each instance omitting relevant evidence not deemed necessary to disclose the error complained of, and *wholly omitting from the bill of exceptions evidence necessary to disclose error of the trial court in failing to find on necessary facts,* then after settlement of bill of exceptions and being foreclosed from adding thereto by expiration of the term, and being under the delusion that no special findings have been requested or made, and therefore that no question of sufficiency of the findings or failure to make findngs may be raised or will be desirable to him on appeal, and knowing that only a prima facie case need be shown as against the motion for judgment, or that so much of the proceedings on rulings on evidence need be shown as to make the point, the term is passed, the appeal docketed, and the litigant then, for the first time, learns from his opponent's motion for diminution of record that the trial judge secretly intended his opinion, designated "Decision," as a "special finding of facts." The litigant also then realizes for the first time that he has permitted a bill of exceptions not containing the whole evidence to be settled, and that it will

avail him nothing to request additional findings within the evidence given on the trial (but not in the bill), or to object or except to these posthumous findings, because he has not preserved the evidence to support his objections.

As we see it, this court by its decision on appellant's petition for diminution of record is to adopt or reject this novel and dangerous rule of procedure. In the interest of justice it can only be rejected.

To illustrate the operation of the rule for which appellant contends, we have only to ask ourselves how would this plaintiff protect its rights as to that part of the judgment debt by which the judgment for $3819.63 exceeds the "some $3000.00 income taxes for 1921" referred to in the trial court decision which appellant would have adopted as special findings, or exceeds the $3,599.92 which the answer (T. 22) admits to have been paid.

Our memory is that in open court upon the trial defendant's attorney assented to the proposition that the amount stated in the complaint was correct. No such admission appears in the bill of exceptions or record. In settling the bill of exceptions we overlooked this omission. The omission would not seem vital in view of the general finding and judgment, and without warning that the opinion might be adopted as special findings at this late date.

Now it is proposed that the decision be adopted as

special findings. But the decision says nothing about $3819.63, and we have no way of bringing the fact even to the attention of the trial judge. We let the bill of exceptions be settled omitting evidence of this amount, or rather omitting record of the admissions in open court, after the entry of the judgment upon the general finding and when we would have a right to rely on the general findings, resting in the belief that no special findings had been or could be made, or that we could be called on to justify the amount fixed in the judgment by reason of anything stated in or omitted from the court's opinion filed in the case.

EVIDENCE AMPLE TO SUSTAIN COURT'S RULING ON DEFENDANT'S MOTION FOR JUDGMENT.

Section 879 Title 28 U. S. C. A. provides,

> "There shall be no reversal * * * for any error in fact,"

and a finding of fact contrary to the weight of the evidence is an error of fact.

Wear v. Imperial etc. Co., 224 Fed. 60-63 (8th).

The history of the Federal statute dealing with special findings in law cases tried to the court and the reasons for its enactment are set out in

Flanders v. Tweed, 9 Wall. 425, 19 L. ed. 678;
Martinton v. Fairbanks, 112 U. S. 670, 28 L. ed. 862.

From these cases it will be seen that a motion for judgment at the close of evidence in a case tried by the court, presents no different question on appeal than such motion in a case tried before a jury. The motion amounts to a demurrer to the evidence. And the question on appeal is

> "Whether the evidence, with every inference of fact that might be drawn from it in favor of the plaintiff, was sufficient in matter of law to sustain a judgment."
>
> Maryland Casualty Co. v. Jones, 279 U. S. 792, 73 L. ed. 960-962.

If there is substantial evidence, the court cannot enter into a consideration of its weight and sufficiency.

Garwood v. Scheiber, 246 Fed. 74, Certiorari denied 247 U. S. 506, 62 L. ed. 1240;
Delaware L. & W. R. Co. v. Kutter, 147 Fed. 51, Certiorari denied 203 U. S. 588, 51 L. ed. 330.

Bearing in mind the ultimate fact for trial is whether this corporation received, owned or was entitled to any taxable income for the year 1921, we find the record discloses that the witness O'Connell testified

> "The plaintiff corporation did not transact any business whatever in the year 1921."

"Did the plaintiff corporation have, or receive, or was it entitled to any income or profits for or in the year 1921?" Answer, "No, sir." (T. 27-28.)

"J. E. O'Connell conducted that bakery business during the year 1921. That is myself." T. 28.

"Purchases were made in the name of J. E. O'Connell; our taxes were paid in the name of J. E. O'Connell." T. 61.

"Sales were in the name of J. E. O'Connell. The billheads were changed." (T. 60-61-64.)

The corporate minutes (T. 31 to 38) disclose a definite purpose to put the corporation out of business.

O'Connell personally owned the bakery (T. 48-49 and Plff's. Exs. 2 and 3).

Apply to this evidence the rule

> "whether the evidence, with every inference of fact that might be drawn from it in favor of the plaintiff, was sufficient in matter of law to sustain a judgment,"

and there seems not the least question of correctness of the trial court's ruling on the motion.

WOULD SPECIAL FINDINGS IN THE TERMS OF THE DECISION SUPPORT THE JUDGMENT?

The action is for money had and received. The pleadings put in issue (a) the amount, (in part), and (b) whether or not the withholding is wrongful, de-

pending on the legality of the tax, or the ultimate fact of whether the corporation or the individual owned the income from the bakery business.

Upon the first question the decision says:

> "In 1926 the Commissioner assessed against the corporation some $3000.00 income taxes for 1921, which the corporation paid, and this action followed." (T. 66.)

It would seem a fair construction to say the word "Commissioner" refers to the United States Commissioner of Internal Revenue, and that the "some $3000.00" refers to amount paid by plaintiff to defendant for which return is here claimed. The answer (T. 22, paragraph III) admits $3,599.92 of the $3,819.93 claimed. If the court's reference to $3000.00 is a special finding of the amount paid, it would support the judgment up to that amount.

On the question of ownership of the income, the decision has this to say:

> "It is obvious that the transaction between the corporation and O'Connell was fictitious insofar as transfer of the former's assets to the latter is concerned." (T. 68.)
>
> "If the corporation had no income, the law imposed no taxes, however much property it owned; and that, whether lack of income was due to poor management, poor business, poor patronage or no collections, or inaction or suspension of business. Moreover, no taxes even though the corporation improvidently gave to another the right

to operate its instrumentalities, conduct the business, and take and enjoy the profits. That is the instant case." (T. 68.)

"The corporation relieved of all labor and responsibility to perpetuate the business, trade name and good will, was likewise of income." (T. 69.)

"Although the intent of the transaction was a sham transfer of title to the property, it was also to really vest O'Connell with all income accruing from his use of the property, thereafter both intents equally executed. The case is as simple as that of John Jones who that year permitted his son Sam to farm his father's land and take the profits. However large the latter, clearly no taxes were due from John. With that case, this is all-fours, even though confused by a disingenuous scheme." (T. 69.)

"The corporation thus having no income in 1921, the taxes assessed were illegal, and plaintiff is entitled to recover as it prays." (T. 69.)

Just what the court meant by the word "fictitious," whether void or voidable, is not clear, but it is a fair inference that the facts set out in the decision, are (a) that an intention to transfer existed, (b) that an attempt to transfer was had, (c) that the bakery business was not conducted by the corporation, (d) that the bakery business was conducted by the individual for the individual, and (e) that the income is the result of the efforts of the individual.

And as conclusions of law, the court found (a) that the income was received and owned by the individual, and (b) that the corporation neither received, nor owned nor was entitled to the income.

Whether these conclusions are correct, it seems to us is tested by the question: *In garnishment proceedings by a creditor of the corporation against the individual to recover that income, which party should prevail;* and if the individual, would it be by reason of some principle of estoppel or because the corporation never had legal title to the proceeds of bread made and sold by the individual?

Of course the individual must prevail in the suppositious case, and by reason of the fact that the corporation never had legal title to the proceeds from sale of the bread.

To illustrate, Sam with consent of his father John Jones uses the father's mare in the trucking business. If the mare has a colt, the colt belongs to John, but John never has any right or title to money received by Sam from the trucking business.

As suggested in our former brief, the Department endeavors, as a matter of convenient procedure, to enforce an office practice of holding in these close corporation cases that ownership of the instrumentalities of the business determines title to the income, but there is no reason for the courts upsetting established law in order to maintain that office practice.

Therefore, we contend that even though the order adopting the decision as special findings were lawful, and even though error had been specified on grounds of insufficiency of the findings, the language

of the decision if given its apparent meaning, would justify the judgment for at least $3,000.00.

QUESTIONS PUT BY COURT ON ORAL ARGUMENT.

Upon oral argument the court submitted two questions, which we ask leave now to discuss.

First: The court asked if appellee was not taking position on appeal contrary to theory upon which the case was tried, with reference to the question of effectiveness of the transfer from the corporation to the individual. We then responded to this question, to the effect that in the court below we had taken the position that transfer of legal title to the bakery and bakery property was not vital to plaintiff's case.

We believe an examination of our opening statement at the trial below (T. 26), together with the fact that no question was put by us on direct examination on the question of title (T. 27-28) and the further fact that the question of title was introduced at the trial by defendant, and finally that *the trial court adopted the theory that title was not controlling* (T. 69) fully sustains our response on oral argument.

An examination of the record discloses that defendant upon the trial undertook to force the theory that the question of effectiveness of the transfer was con-

trolling, while the contrary theory was maintained throughout by plaintiff.

Second: On oral argument the court called attention to the statement, page 8 appellant's brief.

> "it will be noted that he received a salary of $7500 as manager of the corporation in 1920 and a like salary from the 'Eddy Steam Bakery' in 1921,"

and the court asked if that statement was justified by the record.

We replied that any statement to the effect that the plaintiff corporation had paid O'Connell a salary in or for the year 1921, was not justified by the record.

Then the court called attention to the Item 1 of the J. E. O'Connell personal income tax return (Deft. Ex. 6) reading:

> "1. Salaries, wages, commissions, etc., Eddy's Steam Bakery, Helena, Mont. $7500,"

and asked how that item was to be squared with our statement, to which we replied that the name of the corporation in 1921 was O'Connell and Gallivan Company, and that the item could not refer to this corporation, but that we were not well enough versed in accounting to explain the item.

Since that time we have consulted the auditor who made up the return, and while it may be off the rec-

ord, we beg leave to repeat his explanation, which we adopt as our own, viz:

The entry under Item 1, is an offsetting item to the same item found on second page of the Profit and Loss Statement, Exhibit "A" attached to the return as a part of Defendant's Exhibit 6, under the heading "Less Administrative Expenses."

The books of the business are kept in a manner to reflect the *cost of manufacturing,* or *cost of doing business,* and ultimately to reflect the profit or loss in the business. To reflect the true cost of doing business, necessarily the value of O'Connell's services devoted to the business is entered as an item of cost. This item in the Profit and Loss statement forming a part of the tax return, is entered as salary $7500. The results of the Profit and Loss statement reflect the profit from the baking business, after deducting value of O'Connell's services with other costs, and this result $13,370.74 is entered as Item 5 on the face of the tax return, and if the corporation had been doing the business there would be no occasion to make any other entry, but the individual is doing the business and salaries he may charge on his books for the purpose of determining manufacturing cost, are not deductible from a statement of his personal income, and therefore the offsetting item of $7500 must be entered under the Item 1 just as the instructions

printed on the second page of the printed form direct the taxpayer to do.

We assume counsel in making the statement page 8 of original brief was misled into making the assertion. The wording used in the brief is not that O'Connell received salary from the plaintiff corporation, but from "Eddy Steam Bakery." We have every confidence counsel did not mean to be misleading with reference to the matter.

Therefore, we believe we were fully justified in advising the court that the record does not justify any statement to the effect that O'Connell received salary from the plaintiff corporation for the year 1921.

In fact Defendant's Exhibit 6 went in over objection and exception well taken, we think, and should not be considered in the evidence for any purpose.

SUMMARY

Defendant's motion for judgment, raising only the question of whether or not a prima facie case had been made, was rightly denied.

There are no special findings in the record and so there is no other matter which the court can consider, especially in the absence of assignment of error.

The practice of permitting the making of special findings after the term, and after the appeal, would

be not only contrary to established practice, but is patently capable of trapping litigants to the perversion of justice. Therefore, we urge that appellant's motion for diminution of record be denied, and that the judgment of the trial court be affirmed.

Respectfully submitted,

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February 1932.